IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO. 71 OF 1998

1. Mrs. Neelima Anil Aras,]
   aged 33 years, occ: Housewife,]
2. Miss. Ankita Anil Aras,]
   Age 6 years, Occ. Student,]
   Through her natural guardian mother,]
   Mrs. Neelima Anil Aras, both r/at.]
   Renushree Co-Op. Housing Society,]
   Flat No.1, First Floor, 231, Rasta]
   Peth, Pune.] .. Appellants.

Versus

Shri Anil Dattatraya Aras,]
age 48 years, Occ. Service, residing at]
Renushree Cooperative Housing Society]
Flat No.1, First Floor, 231, Rasta Peth,]
Pune 411 011, and serving as Product]
Manager, Forbe & Marshall, “H” Block]
MIDC Estate, Pimpri, Pune-411 018.] .. Respondent
(Ori. Respondents)

Mr. Prafulla B. Shah with Ms. Smita Mane for the appellants.

Mr. K.Y. Mandlik for the respondent.

CORAM: F.I. REBELLO &
ANOOP V. MOHTA, JJ

DATED: 10TH AUGUST, 2004.

ORAL JUDGMENT: ***[Per F.I. Rebello, J.]***

1. This Appeal is preferred by the appellant-wife being dissatisfied with the judgment and decree dated 16th October, 1998 passed by the Court, Pune, in Petition No. 46 of 1997. That was a Petition by the appellant for interim maintenance under Section 18 read with Section 20 of the Hindu Adoption & Maintenance Act, 1956. By the said application, the appellant No.1 sought interim maintenance @ Rs.3,000/- for herself and Rs.2,000/- for her minor daughter/appellant No.2 By the impugned order, the learned Court was pleased to partly allow the said application. The respondent-husband was directed to pay Rs.2,000/- to the appellant No.1 by way of maintenance from 23rd June, 1997 + costs of Rs.1,00/-. The claim of the appellant No.2 for maintenance was rejected. By the present Appeal, the appellant has challenged the order of interim maintenance awarded in her favour in the sum of Rs.2,000/- and claimed

maintenance of Rs.3,000/- and has also challenged the rejection of the maintenance in favour of the appellant No.2 and the awarding of costs.

2. At the hearing of the Appeal on behalf of the appellant, the learned counsel contends that the learned Judge misdirected himself in law in holding that the appellant No.2 is not the validly adopted daughter of the respondent. It is submitted that it was the respondent who had made a Deed of Adoption dated 16th September 1995 and consequently, in the absence of the challenging the Deed of Adoption by instituting proper proceedings, cannot contend that adoption is null and void.

3. The first issue that is to be considered there is whether it was open to the learned Court to bypass the Deed of Adoption dated 16th September 1995 entered into between the appellant No.1 with the respondent whereby the respondent had agreed to take the appellant No.2 as his validly adopted daughter. A few facts may now be set out.

The appellant No.1 was earlier married to one Shri Sitaram A. Sabnis on 26th January, 1991. The appellant No.1 thereafter filed a Petition for divorce against the said Shri Sitaram Sabnis being Petition No. 451 of 1992 for dissolution of the marriage. An exparte decree came to be passed on 4th July, 1994. The

aforesaid Sabnis took out Misc. Application No. 102 of 1996 in M.J. Petition No.451 of 1992 on 28th June, 1996. The exparte decree was set aside and the Petition was restored to file. We further find that Consent Terms were filed between the two parties on 29th June, 1996 of which Clause 4-A reads as under:

> *"4A. In view of the aforesaid, decree dated 4/7/1994 passed for maintenance be partly set aside and be disposed of accordingly."*

The decree further notes that the parties applied for converting the Petition into a Joint Petition for divorce by mutual consent. That was pursuant to application of 15th July, 1996. The learned Court allowed the conversion of the Petition into a Joint Petition under Section 13(b) of the Hindu Marriage Act and accordingly, on 15th June 1996, the marriage solemnized between petitioner - Nisha and Sitaram on 26th January 1991, stood dissolved by decree of divorce. The appellant, in the meantime, had married respondent on 3rd October 1995. The Deed of Adoption, as noted earlier, is of 16th September, 1995. It is in this background that the contentions on behalf of the appellant and respondent will have to be considered.

4. Adoption of a Hindu child is governed by the provisions of Section 9 of the Hindu Adoption & Maintenance Act, 1956. It provides that no person,

except the father or mother or the guardian of the child shall have the capacity to give the child in adoption. Sub-section (2) provides that subject to the provisions of sub-section (3) and sub-section (4), the father, if alive shall alone have the right to give in adoption, but such right shall not be exercised save with the consent of the mother unless the mother has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. Under sub-section (3), the mother may give the child in adoption if the father is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. Sub-section (4) provides that where both the father and mother are dead or have completely and finally renounced the world or have abandoned the child or have been declared by a court of competent jurisdiction to be of unsound mind or where the parentage of the child is not known, the guardian of the child may give the child in adoption with the previous permission of the court to any person including the guardian himself. This sub-section will not apply. In the instant case, there is no dispute that the biological father of the appellant No.2 was alive at the purported time when the Deed of Adoption was entered into as also the biological mother, nor were the other predicates existing. The mother could give in adoption if the predicates of sub-sec.(3) were satisfied. The contention on behalf of appellant No.1 is, that by the Consent Terms, the biological father had conferred all rights on the biological mother as set out in

paragraph 3 of the Consent Terms dated 20th June 1996 and which are reproduced as under:

> *"3. The permanent custody of the child "Laxmi" will remain with the petitioner and she has right to do anything which is for the Welfare of the child and she has right to think and to do all the acts and to take decision for the welfare of the child as she thinks fit, and respondent shall not interfere or disturb or prevent for the said, to the petitioner or the child."*

It is submitted that it is under this provision that the appellant No.1 could have given the child in adoption.

Admittedly, none of the predicates of sub-sec. (3) are satisfied. The Consent Terms cannot be read to mean that `permanent custody' does not mean that the mother could give in adoption.

5. The only other question is whether considering the Deed of Adoption and these Consent Terms, the respondent was precluded from contending that the Deed of Adoption is a nullity at law. The Consent Terms, no doubt, are between the biological mother and the biological father. The Deed of Adoption is between the biological mother and the present respondent. On the reading of Section 9 of the Hindu Adoption & Maintenance

Act 1956, which starts with a *non-obstante* clause, the father or mother or the guardian cannot give a child in adoption, other than as provided by the requirements of the section. That section is clear that during the lifetime of the biological father it is the biological father alone who can give the child in adoption unless he is incapable in terms of sub-section (3) of Section 9. It was not the case of appellant that the biological father was precluded considering sub-section (3) of Section 9. Once that be the case, considering sub-section (2), it was the biological father alone who could give the child in adoption and with the consent of the mother. The biological mother alone could not have, based on clause 3 of the Consent Terms, given the child in adoption. This would be contrary to the public policy contained in Section 9(2). Once that be the case, it was open to the Court, while considering the application for interim maintenance, to also consider whether the Deed of Adoption was in law, enforceable considering Section 9(1)(2) of the Hindu Adoption & Maintenance Act, 1956. On behalf of the appellant No.1, learned counsel placed reliance on the judgment in the case of *Ms. Gita Hariharan vs. Reserve Bank of India* **[AIR 1999, S.C., 1149]** to contend that the mother could be the natural guardian/legal guardian and if so, could have given the child in adoption. On a perusal of the issue involved in that case, the limited issue before the Apex Court was whether the mother, even during the lifetime of the father, could have acted as a guardian of the minor child. The issue of adoption

was not at all the issue. Even assuming that the mother could be a guardian, the case of the appellant No.1 could not fall under sub-section (4) of Section 9 of the Act as both the biological parents were alive. They had not renounced the world. They had not abandoned the child or had been declared by a Court of competent jurisdiction to be of unsound mind. It is, therefore, not possible to accept the contention that the appellant No.1 could act as a legal guardian pursuant to sub-section (4) of Section 9 of the Act. Once we so hold, it is clear that the Deed of Adoption was clearly contrary to the provisions of law and it was open to the Court, while considering an application for maintenance, to consider the said Deed of Adoption. We do not find that the learned Trial Court has committed any error of law either in interpreting the section or otherwise, while arriving at the conclusion arrived at. The view taken, if not probable, is the only possible view insofar as adoption is concerned. Considering that, it will not be possible to interfere with the order of the Court denying maintenance to the appellant No.2.

6. Insofar as other contentions are concerned, interim maintenance was granted, based on the material before the Court. There is really not much of a serious challenge on the ground of awarding maintenance. In the light of that, we do not find that this would be a fit case to interfere with the order passed by the Court insofar as maintenance and costs are concerned. If there are changed circumstances warranting higher maintenance, it will be open to the appellant No.1

to take out appropriate proceedings.

6. For the aforesaid reasons, Family Court Appeal No.71 of 1998 is dismissed. In the circumstances of the case, there shall be no order as to costs.

[F.I. REBELLO, J.]

[ANOOP V. MOHTA, J.]